STATE OF MICHIGAN
IN THE SUPREME COURT
(On Appeal from the Michigan Court of Appeals)

DEPARTMENT OF HEALTH AND HUMAN SERVICES,

Plaintiff-Appellee,

v

SC No. 153356
COA No. 326642
Bay Probate Court

RICHARD RASMER, Personal Representative of Estate of OLIVE RASMER,

Defendant-Appellant.

The Appeal involves a ruling that a provision of the Constitution, a statute, or other State governmental action is invalid.

/

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DEPARTMENT OF HEALTH AND HUMAN SERVICES,

Plaintiff-Appellant,

v

SC No. 153370
COA No. 323090
Huron Probate Court
LC No. 13-039597-CZ

In re Estate of IRENE GORNEY,

Defendant-Appellee.
/

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DEPARTMENT OF HEALTH AND HUMAN SERVICES,

Plaintiff-Appellant,

v

SC No. 153371
COA No. 323185
Calhoun Probate Court
LC No. 13-000992-CZ

In re Estate of WILLIAM B FRENCH,

Defendant-Appellee.
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DEPARTMENT OF HEALTH AND HUMAN SERVICES,

Plaintiff-Appellant,

v

SC No. 153372
COA No. 323304
Clinton Probate Court
LC No. 14-028416-CZ

In re Estate of WILMA KETCHUM,

Defendant-Appellee.
/

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DEPARTMENT OF HEALTH AND HUMAN SERVICES,

Plaintiff-Appellant,

v

SC No. 153373
COA No. 326642
Bay Probate Court
LC No. 14-049740-CZ

RICHARD RASMER, Personal Representative of Estate of OLIVE RAMSER,

Defendant-Appellee.
/

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DEFENDANTS-APPELLEES' APPEAL BRIEF IN RESPONSE TO THE APPEAL BRIEF OF PLAINTIFF-APPELLANT MICHIGAN DEPARTMENT OF HEALTH AND HUMAN SERVICES IN DOCKET NOS. 153370-153373

APPENDIX

ORAL ARGUMENT REQUESTED

TABLE OF CONTENTS

TABLE OF AUTHORITIES

State Cases

Federal Cases

State Constitutional Provisions

Federal Constitutional Provisions

State Statutes

Federal Statutes

Court Rules

Other Authority

STATEMENT OF THE BASIS OF JURISDICTION

Defendants-Appellees Estates of Irene Gorney, William B. French, Wilma Ketchum and Olive Rasmer ("Estates") agree with the Plaintiff-Appellant Department of Health and Human Services' ("DHHS") statement of the basis of jurisdiction.

STATEMENT OF THE QUESTIONS FOR REVIEW

I. DOES MCL 400.112g-k PERMIT THE DHHS TO SEEK ESTATE RECOVERY FOR MEDICAID SERVICES PROVIDED TO AN INDIVIDUAL BEFORE THAT INDIVIDUAL RECEIVED NOTIFICATION OF THE ESTATE RECOVERY PROGRAM FROM THE DHHS?

II. DOES ESTATE RECOVERY FOR SUCH PRE-NOTIFICATION SERVICES CONSTITUTE A VIOLATION OF AN INDIVIDUAL'S SUBSTANTIVE AND/OR PROCEDURAL DUE PROCESS RIGHTS?

III. IS A CHALLENGE TO THE DHHS' ESTATE RECOVERY EFFORTS UNDER MCL 400.112g (4) SUBJECT TO JUDICIAL REVIEW?

STATEMENT OF FACTS

The Estates do not disagree with the DHHS' Statement of Facts as far as it goes, but provide these additional facts for a more complete factual statement so as to assist this Court in deciding the questions presented. Also, the Estates incorporate by reference the Statement of Facts from the Appellant's Brief for the Estate of Olive Rasmer in No. 153356.

1. Estate of Irene Gorney

Irene Gorney began receiving long-term care Medicaid benefits in September 17, 2010. (16a; 24a). At the time she signed the initial application for enrollment in the Medicaid program for long-term care services, she was not provided with any notice of the Michigan Medicaid estate recovery program. (16a). Irene Gorney signed the renewal application in April 2012 when she was 92 years old and in fragile health. (24a). Irene Gorney's daughter, Carol Oman, was her contact person with the Medicaid program through the Huron County Department of Human Services ("DHS"), and helped her mother with the DHS' documentation. (16a). Irene Gorney and/or Carol Oman signed Irene's renewal application annually, certifying that her assets and income listed in the application were accurate. (16a). No one from the Huron County DHS ever mentioned or discussed the estate recovery program with Irene Gorney, Carol Oman, or any other family member. (16a). Irene Gorney died in April 2013. (16a).

Thereafter, the Estate of Irene Gorney ("the Estate") denied the Michigan Department of Community Health's ("MDCH") claim for estate recovery under MCL 400.112g. (14a). On November 1, 2013, the MDCH filed a civil action for estate recovery against the Estate. (14a). On March 27, 2014, the Estate filed a Motion for Summary Disposition under MCR 2.116(C)(8) and (10), claiming that "the home of a person receiving medicaid assistance was always considered to be exempt" and that "[t]he Estate Recovery Statute . . . was a significant change in

Michigan law," requiring that "persons applying for or receiving long-term care Medicaid assistance [be put] on notice in writing that some or all of their Estate may have to repay their Medicaid assistance." (17a). In support, the Estate relied upon the Gratiot Probate Court's decision in *In re Estate of Amy Grosskopf* (No. 12-138-CZ) (2012) [1b-9b] and the Clinton County Probate Court's decision in *In re; The Estate of Kathryn M. Salemka-Shire* (No. 11-127599-CZ) (2012) [Estate of Olive Rasmer Appellant's Appendix, 76a-82a], in opposition to the MDCH's argument that the mere existence of statutory notice was sufficient. (17a-18a). In those cases, the respective probate courts rejected the MDCH's argument, "saying that the unambiguous language in the Statute required the State to provide written notification." (18a). Specifically, Gratiot Probate County Judge Kristin Baker in *Grosskopf* held:

> The unambiguous language of MCL 400.112g(3)(e) and MCL 400.112g(7) require written materials regarding hardship and estate recovery to be provided to individuals seeking benefits for long term care. Read together, the provisions of [the] Michigan medicaid estate recovery program create a procedure by which the department of community health can recover the costs of benefits paid from the estates of medicaid recipients upon their death. That procedure requires actual notice in the form of written materials to potential medicaid recipients at the time of enrollment. Compliance with that procedure could not and did not occur at the time of decedent Grosskopf's enrollment. [6b-7b].

Further, the Estate claimed that "an acknowledgment signed by decedent that she had received and reviewed a copy of the acknowledgment that explains additional information about applying for and receiving Medicaid was sufficient notice of Estate Recovery." (19a). According to the Estate, "[t]he acknowledgment appears to be signed by a 92-year old resident of a nursing home. Is she expected to comprehend and understand this new provision without the change being pointed out to her and explained?" (19a). The Estate further stated:

> As the Judge in *Grosskopf* said, "the redetermination notice was not timely for the reason it did not provide the recipient with a meaningful opportunity to appreciate and understand the potential liability of her Estate. Further, to allow Estate Recovery in that

> case would render the notice provision required by the Estate Recovery Act meaningless." (19a).

Because there were "no facts in dispute," the Estate argued that "[t]he State has failed to provide notice as required by Statute and thus has filed a claim for which relief cannot be granted." (19a).

In addition, the Estate requested that the probate court deny the MDCH's Motion for Summary Disposition under MCR 2.116(C)(9) and (10), claiming that no "meaningful written information regarding Estate Recovery was provided to Irene Gorney on April 12, 2012" when she was 92 years old, in a long term care facility, in fragile health, and that she was not capable of understanding Paragraph 12 of the Acknowledgment form revision in October of 2011, if it had been provided, which the Estate denies." (23a-24a). Relying upon the Clinton County Probate Court's decision in *In re*: *The Estate of Kathryn M. Salemka-Shire*, No. 11-127599-CZ (April 30, 2012), the Estate claimed that the State "clearly cannot establish it provided the requisite notice required by the statute." (25a-26a).

On April 22, 2014, the Bad Axe Probate Court, the Honorable David L. Clabuesch presiding, entered an order granting partial summary disposition to the Estate, "dismissing with prejudice all claims of Plaintiff against Defendant Estate for Long Term Benefits paid by Medicaid prior to April 4, 2012," but setting for trial "Plaintiff's claim for reimbursement of long term benefits paid by Medicaid from and after April 4, 2012 to February 2, 2013, Irene Gorney's date of death" as to "the disputed questions of fact regarding what notice of Estate Recovery was provided to the decedent, Irene Gorney, in April of 2013." (28a-29a).

On May 6, 2014, the Estate amended its Affirmative Defenses to state in pertinent part:

> 8. The Michigan Courts have recognized that under the due process clause of the 14th Amendment, individuals whose property interests are at stake must be afforded notice and an opportunity to be heard. Since Decedent's property interests are at stake, due process requires her to be afforded notice of any change

in long term care Medicaid benefits which would affect her property rights. No such due process was provided to Decedent. (31a).

In addition, the parties agreed on a list of Partial Stipulated Facts, among the following:

1. The Michigan Legislature enacted MCL 400.112g-k, effective September 30, 2007, as an enabling statute that granted the Department of Community Health the authority to establish and administer Michigan's estate recovery program.

* * *

23. The Department of Community Health relies upon the Acknowledgments contained in the Medicaid DHS-4574 (Rev. 10-11) that Carol Oman completed on or around April 4, 2012 to satisfy the written information requirement under MCL 400.112g(7).

* * *

29. The Department of Community Health paid $146,301.53 in Medicaid assistance toward Irene Gorney's medical services while she was eligible for Medicaid.

30. The State of Michigan paid $49,427.36 in Medicaid benefits for Irene Gorney from April 4, 2012, when the Medicaid DHS-4574 (Rev. 10-11) was completed, until Irene Gorney's death on April 2, 2013. (33a, 37a)

Following a bench trial on July 21, 2014, the probate court ruled from the bench that the State did not provide proper notice under due process. (39a-59a). In pertinent part, the probate court stated:

> Now, I look at this from a due process standpoint of that whenever a government seeks to deprive a person of substantial property, then it must give that person some type of notice, and that notice must be designed to place a person of reasonable intelligence and capacity so that they, that a reasonable person of intelligence and comprehension on notice of the government is seeking to effect the property interest in question . . . . I'm finding that that is not sufficient to simply tell the people, provide them written information about it, but I think you have to put them on notice that we're effecting their property right, because it lacks sufficiency, I'm denying the claim for that . . . reason." (55a-56a).

On July 23, 2014, the probate court entered a Judgment "dismissing Plaintiff's claim against Defendant Estate with prejudice . . . " (71a-72a).

On appeal, in an Amended Response to the Court of Appeals, the Estate of Irene Gorney argued that the Department violated procedural due process by failing to provide Irene Gorney with proper notice under MCL 400.112g(7). (74a-75a). In pertinent part, the Estate maintained:

> The Department is attempting to ignore the Decedent's interest in her property when the law changed, because she is now dead and the property in her Estate is to be divided among her three children. It was her property right which existed in April of 2012 and somehow now those property rights do not now exist because she is dead. She relied on the exemption of her home when she decided to go into a nursing home and receive Medicaid assistance. With proper notice under g(7), she could have made an informed decision if she wanted to continue Medicaid assistance and her Estate essentially lose her home, or consider other options previously mentioned, lady bird deed, go home and hire help, or move in with one of her three children. Had she been properly notified about Estate Recovery and elected to continue as is, then the Department would have a valid claim. Because the Department failed to satisfy g(7), she did not have those options. She lost a valuable property right when the Department can now claim an interest in her Estate after her death. (74a-75a).

2. Estate of William B. French

William B. French received Medicaid benefits beginning on September 1, 2008 until his death on February 9, 2013. (98a). Upon his death, the Michigan Department of Community Health ("MDCH") initiated an estate recovery action against his Estate for the costs of his medical care. (98a). Subsequently, on July 5, 2013, the MDCH sent David G. French, brother of the deceased and personal representative of his Estate, a Statement and Proof of Claim, alleging that the deceased is "justly indebted to the State of Michigan in the amount of $155,363.13 for Medicaid payments made on his behalf for long-term care services." (94a, 99a). On August 29, 2013, David French served a Notice of Disallowance on the MDCH, stating that the MDCH had failed to provide the deceased with written notice of the provisions of the estate recovery program at the time of his enrollment in the Medicaid program for long-term care services. (99a). In support, David French attached the opinion of the Clinton County Probate Court in *In re*: *The*

Estate of Kathryn M. Salemka-Shire, No. 11-127599-CZ (April 30, 2012) [Estate of Olive Rasmer Appellant's Appendix, 76a-82a].

Thereafter, the MDCH filed a Complaint against the Estate. (94a). In its Answer, the Estate denied "the validity of any alleged indebtedness in the complaint, and further denies compliance with the notice requirements under MCL 400. 112g of the Michigan Estate Recovery Program, and further exemptions allowed by law must be applied to any balance that may be owed." (90a). Specifically, the Estate claimed that "the State does not have a valid claim against the Defendant because of the hardship exception for modest value homes." (90a). Further, pursuant to MCL 400.112g(4), the Estate claimed that "the State's continued pursuit of estate recovery is not in the best economic interest of the State." (90a). On April 4, 2014, the Estate filed a Motion for Summary Disposition pursuant to MCR 2.116(C)(8) and (10). (93a-96a). In its brief in support, the Estate, relying upon the Clinton County Probate Court's decision in *In re*: *The Estate of Kathryn M. Salemka-Shire*, claimed that the State's Complaint must be dismissed because it violated the notice provision of MCL 400.112g(3)(e) by failing to provide proper notice to the deceased at the time he applied for enrollment in the Medicaid program for long-term care benefits. The MDCH also filed a Motion for Summary Disposition pursuant to MCR 2.116(C)(10).

Following a hearing on the cross-motions for summary disposition, the Calhoun County Probate Court, the Honorable Michael L. Jaconette presiding, entered an order granting the Estate's motion for summary disposition and denying the MDCH's motion for summary disposition on July 27, 2014. In pertinent part, the probate court ruled:

> [T]here is no written material which explains the process for applying for a waiver from estate recovery due to hardship, as statutorily required by MCL 400.112g(3)(e). Likewise, the written material given to them does not provide written information to individuals seeking medicaid eligibility for long-term care services describing the

> provisions of the Michigan medicaid estate recovery program, including, but not limited to, a statement that some or all of their estate may be recovered, as statutorily required by MCL 400.112g(7). [157a-158a].

The probate court also rejected as "without merit" the MDCH's argument that "the mere existence of the statute itself [MCL 400.112g], plus the SPA [State Plan Amendment] and two policy manuals – the Bridges Administrative Manual and the Bridges Eligibility Manual – somehow constitutes sufficient notice to Defendant." (158a). Further, the probate court denied that the written information contained in Paragraph 12 of the Acknowledgments page of the Medicaid Application form DHS-4574 (Rev. 10-11), "which Daniel French was provided in May, 2012, when he reapplied for Medicaid benefits on behalf of William French," is sufficient. (159a). Finally, the probate court agreed with Judge Lisa Sullivan of the Clinton County Probate Court in *In re*: *The Estate of Kathryn M. Salemka-Shire* that "due process rights related to statutorily required notice obligations are paramount when an individual's property interests are at stake." (161a). Specifically, in rejecting the State's argument that "there is nothing in the statute which bars estate recovery if a person was not provided the required written information, the probate court observed:

> As Judge Sullivan noted in rejecting that same argument in *Shire*: "The specific notice provisions required by MCL 400.112g safeguard these individuals [Medicaid applicants] by providing the resources that explain the future risk to their assets as a result of accepting Medicaid benefits. Plaintiff's position that it should not be barred from recovery where it fails to comply with these safeguards, renders the notice provisions useless and is contrary to the intent of both federal and state Medicaid law" (emphasis added). This Court affirmatively adopts the analysis by Judge Sullivan. It is not that the statute contains a penalty to Plaintiff in the event of noncompliance with its statutory notice obligations; rather, compliance with the statutory notice obligations is a condition that that must be met in order for Plaintiff to seek estate recovery under the statute. [161a-162a].

3. Estate of Wilma Ketchum

Wilma Ketchum began receiving Medicaid long-term care benefits from the State of Michigan in November 2010 when she was 88 years old. (174a, 215a-216a). Before she applied for Medicaid benefits in October 1, 2010, Wilma Ketchum's three daughters had provided care for her in her own home for several years until they could no longer care for her. (215a). At the time Wilma Ketchum applied for Medicaid long-term care benefits, she had exhausted all her assets, except for a home of modest value and a bank account with less than $2,000. (216a).

Wilma Ketchum's daughter, Janet Miller, was empowered to act as her agent under a durable power of attorney. (175a). When Wilma Ketchum applied for Medicaid on October 1, 2010, the Acknowledgments page of the Medicaid application form (DHS-4574 (Rev. 2-07)) contained no written information regarding estate recovery. (217a). On August 31, 2011, Wilma Ketchum completed another Medicaid application form (DHS-4574 (Rev. 2-10)) as part of the Medicaid annual redetermination process, and the Acknowledgments page again contained no written information regarding estate recovery. (217a). On August 24, 2012, she completed a 12-page Medicaid application form (DHS-4574 (Rev. 10-11)) as part of the Medicaid annual redetermination process, and this time there was a new "boiler-plate" paragraph about estate recovery in the Acknowledgments, but nothing to draw the reader's attention to it or indicate that it contained new or revised information. (217a). Specifically, the Acknowledgment stated:

> 12. Estate Recovery. I understand that upon my death the Michigan Department of Community Health has the right to seek recovery from my estate for services paid by Medicaid. MDCH will not make a claim against the estate while there is a legal surviving spouse or a legal surviving child who is under the age of 21, blind, or disabled living in the home. An estate consists of real and personal property. Estate Recovery only applies to certain Medicaid recipients who received Medicaid services after the implementation date of the program. MDCH may agree not to pursue recovery if an undue hardship exists. For further information regarding Estate Recovery, call 1-877-791-0435.

Janet Sue Miller signed all the above-described applications, but neither she nor her mother received any other notice about the written provisions of estate recovery. (217a-218a). Wilma Ketchum received Medicaid long-term care benefits until her death on August 1, 2013. (216a).

After Wilma Ketchum died, the Michigan Department of Community Health ("MDCH") sought reimbursement for the Medicaid assistance provided to her pursuant to the Michigan estate recovery program. When the Personal Representative of the Estate of Wilma Ketchum denied the claim, citing the MDCH's failure to provide the required notice to the decedent at the time of her enrollment in Medicaid, the MDCH filed a civil action for relief. In its Response to a Civil Action for Estate Recovery on February 28, 2014, the Estate stated the following in its affirmative defenses:

12. The Michigan Medicaid estate recovery program requires the Department of Community Health to provide written notice at the time an individual enrolls in Medicaid for long-term care as follows:

> At the time an individual enrolls in medicaid for long-term care services, the department of community health shall provide to the individual written materials explaining the process for applying for a waiver from estate recovery due to hardship. MCL 400.112g(3)(e)

Respondent/Defendant's decedent (Wilma Frances Ketchum) filed her Medicaid Application on or about October 1, 2010. Ketchum did not receive the required written materials at the time she enrolled in Medicaid, as the Michigan Medicaid estate recovery program had not yet been implemented, due to the following provision in the estate recovery program:

> The department of community health shall not implement a Michigan Medicaid estate recovery program until approval by the federal government is obtained. MCL 400.112g(5)

13. The Michigan Medicaid estate recovery program requires the Department of Community health to provide written information to individuals seeking Medicaid eligibility for long-term care services, describing the provisions of estate recovery program, as follows:

> The department of community health shall provide written information to individuals seeking medicaid eligibility for long-term care services describing the provisions of the Michigan medicaid estate recovery program, including, but not limited to, a statement that some or all of their estate may be recovered. MCL 400.112g(g)(7).

Respondent/Defendant's decedent did not receive the required written information when she was seeking Medicaid eligibility for long-term care services, as her Medicaid Application was filed was filed on or about October 1, 2010, and the Michigan Medicaid estate recovery program could not be implemented until approval by the federal government, which approval was not received until May 23, 2011 (see Paragraph 12, above).

14. The Michigan Medicaid estate recovery program provides an exemption from estate recovery for all or a portion of the value of the Medicaid recipient's homestead, as follows:

> An exemption for the portion of the value of the medical assistance recipient's homestead that is equal to or less than 50% of the average price of a home in the county in which the medicaid recipient's homestead is located as of the date of the medical assistance recipient's death. MCL 400.112g(3)(e)(i)

The value of Ketchum's homestead, appraised shortly after date of death, was $28,000; however, the homestead has since been sold for $30,000. The average value of a home in Clinton County, where decedent's homestead was located, was $130,359 in the year of Ketchum's death, pursuant to the 2013 Clinton County Equalization Department Report published by the Clinton County Equalization Department. Based upon that report, 50% of the average value of a home in Clinton County was $65,179. The value of the Ketchum's homestead was therefore less than 50% of the average price of a home in Clinton County, and an exemption for the value of the homestead is required by the statute. . . .

15. The Michigan Medicaid estate recovery program provides that estate recovery shall not be pursued when it is not in the best economic interest of the state, as follows:

> The department of community health shall not seek medicaid estate recovery if the costs of recovery exceed the amount of recovery available or if the recovery is not in the best economic interests of the state. MCL 400.112g(4)

The Inventory for the Estate has been filed at the Clinton County Probate Court, and a copy has been provided to Claimant/Plaintiff. The Inventory lists assets with a total value of $32,350.66, which includes $30,000 for the homestead. Therefore, a maximum of $2,350.66 would be subject to an estate recovery claim

should Claimant/Plaintiff's claim be allowed by the Court; however, pursuant to statute, funeral expenses, costs of administration, and the exempt property allowance would have higher priorities for payment. Pursuit of estate recovery by Claimant/Plaintiff in this matter is not in the best economic interest of the state.

16. The Due Process Clause of the Fourteenth Amendment requires notice and an opportunity to be heard when an individual's property interests are at stake. Michigan's Medicaid estate recovery statute, which was passed on September 30, 2007, required federal approval of Michigan's State Plan Amendment (SPA) prior to implementation, which was not received until May 23, 2011, although the effective date of the SPA was determined to be July 1, 2010.

Respondent/Defendant's decedent (Ketchum) sought eligibility for long-term care and filed a Medicaid Application to enroll in Medicaid on or about October 1, 2010, prior to the federal approval and implementation of the SPA on May 23, 2011; therefore, the decedent did not receive any of the required written notices or information explaining Michigan's Estate Recovery Plan at the time she sought eligibility for long-term care and enrolled in Medicaid. Claimant/Plaintiff's claim for estate recovery from the estate of decedent therefore violates decedent's due process rights for notice and an opportunity to be heard. While the facts of this case are distinguishable, this Court, in an unpublished opinion in the matter of *Michigan Dept of Community Health v Estate of Kathryn M. Salemka-Shire* (Case /No. 11-127599-CZ), found that the lack of due process rendered the recovery proceeding invalid. [171a-173a].

In Response to the MDCH's Motion for Summary Disposition under MCR 2.116(C)(10), the Estate argued that Wilma Ketchum's due process rights were violated when the MDCH failed to provide notices regarding estate recovery as required by MCL 400.112g(3(e) and (7), and thus rendering its claim for estate recovery invalid. (221a). The Estate also argued that it was undisputed that the value of Ketchum's homestead was less than 50% of the average price of a home in Clinton County on the date of her death. (219a). Further, the Estate claimed that the costs of recovery exceed the amount of recovery available since there was no funds available for payment of the MDCH's estate recovery claim. (220a).

Following a hearing on July 30, 2014, Clinton County Probate Court Judge Lisa Sullivan issued an Opinion and Order on August 5, 2014 denying MDCH's motion for summary disposition and dismissing its claim with prejudice. (230a-235a). In pertinent part, the Clinton

County Probate Court found that MCL 400.112g(3)(e) required written information to the decedent about the process for applying for a hardship waiver (232a); that the decedent was not provided with written material about the estate recovery program at the time of enrollment in Medicaid (232a-233a); that the MDCH is barred from recovery because it did not comply with the State Plan as required by 42 USC sec. 1396p (233a); that the MDCH did not provide "the decedent with a meaningful opportunity to knowingly and voluntarily place her only (and meager) assets at risk of recovery" (234a); and that as a matter of public policy, "specific notice requirements of MCL 400.112g safeguard these individuals by providing the resources that explain the future risk to their remaining assets as a result of accepting Medicaid benefits." (234a). On November 12, 2014, the Fiduciary of the Estate provided an Account listing total balance of assets remaining after disbursements as $1,572.90. (236a).

4. Estate of Olive Rasmer

The Estates incorporates by reference the Statement of Facts from the Appellant's Brief for the Estate of Olive Rasmer in No. 153356.

INTRODUCTION

In 1993, Congress mandated Medicaid estate recovery plans for all fifty States with the enactment of the Omnibus Budget Reconciliation Act of 1993 ("OBRA"). See 42 USC § 1396p(b). The pertinent section of this statute states "the State shall seek adjustment or recovery of any medical assistance correctly paid on behalf of an individual . . . who was 55 years of age or older when the individual received such medical assistance." 42 USC § 1396p(b)(1). Specifically, the OBRA amendments required that States seek recovery from the probate estate of recipients, but also permitted States to seek recovery from other assets in which the Medicaid recipient had an interest at death such as assets held in a living trust or joint tenancy with right of survivorship. At the same time, Congress required States to establish hardship waiver procedures in accordance with regulations promulgated by the Department of Health and Human Services. See 42 USC § 1396p(b)(3). Pursuant to these provisions, a State may waive application of estate recovery when it would result in an "undue hardship" on the individual. 42 USC § 1396p(b)(5). On Sept. 30, 2007, Michigan became the 50th state to enact Medicaid estate recovery rules mandated 14 years earlier by OBRA.

The enactment of mandatory estate recovery transformed "the Federal Medicaid program for institutional long-term care from a public entitlement program to a quasi-loan program." See Jan Ellen Rein, *Misinformation and Self-Deception in Recent Long-Term Care Policy Trends*, 12 J L & Politics 195, (1996), quoting Patricia Nemore, Medicaid Estate Recovery: History, Current Law & Advocacy Issues, 8 NAELA Q 38, 41 (1995).[1] In effect, mandatory estate recovery

[1] Professor Rein also observed that Charles Sabbatino and Roger Schwartz noted while participating in a roundtable discussion on estate recovery sponsored by the American Bar Association (ABA) Commission on Legal Problems of the Elderly on June 3, 1994 that "No

became a debt-collection program enacted to recover the long-term care costs of deceased Medicaid beneficiaries. See U.S. Dep't of Health and Human Services, Policy Brief #4, Medicaid Liens 3 (2005), http://aspe.hhs.gov/sites/default/files/pdf/74096/liens.pdf ("The objective of [estate recovery] was to recover taxpayer dollars invested in Medicaid by requiring more people to use private resources to defray the costs of their own long-term care.").[2] Reduced to its legal essence, the Medicaid estate recovery program functions as a loan agreement secured by the real and personal property in the Medicaid beneficiary's estate, with collection taking place after death.

The principal questions presented here are whether the protections of the Due Process Clauses under the Fourteenth Amendment to the U.S. Constitution and Article 1, § 17 of the 1963 Michigan Constitution require the DHHS to provide timely and reasonable sufficient written notice of the provisions of the estate recovery program and what actions may be taken against an individual's estate at the time the individual applies for enrollment in the Medicaid program for long-term care services. The Estates maintain that the DHHS violated the Due Process Clauses of the federal and state constitutions because they did not provide such notice to the Medicaid beneficiaries at the time they applied for enrollment in Medicaid. Consequently, the DHHS cannot apply retroactively the estate recovery program against the Estates in these consolidated cases. Finally, the DHHS' determinations of cost-effectiveness in applying the estate recovery program are subject to judicial review.

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other health benefit or insurance program in the country, public or private, treats health coverage as a 'loan' that must be paid back by the beneficiaries' estates."

[2] Under estate recovery, States are required to seek recovery of Medicaid payments from the individual's estate for nursing facility services, home and community-based services, and related hospital and prescription drug services, and also have the option of recovering payments for all other Medicaid services provided to these Medicaid beneficiaries. See 42 USC § 1396p(b)1(B)(i) and (ii).

APPELLATE STANDARDS OF REVIEW

This Court applies various standards of review to this case. First, this Court reviews questions of constitutional law de novo. *Elba Twp v Gratiot Co Drain Comm'r*, 493 Mich 265, 277 (2013).

Second, issues of statutory interpretation are also reviewed de novo. *State ex rel Gurganus v CVS Caremark Corp*, 496 Mich 45, 57 (2014). "The goal of statutory interpretation is to give effect to the Legislature's intent, focusing first on the statute's plain language." *Id.* at 59 (quotation marks and citation omitted). Statutes are interpreted as a whole, and words or phrases are interpreted in consideration of their context and purpose in the statutory scheme. *Id.* Thus, "words and phrases used in an act should be read in context with the entire act and assigned meanings as to harmonize with the act as a whole, and a word or phrase should be given meaning by its context or setting." *Hannay v Dept of Transp*, 497 Mich 45, 57 (2014). When a statute is ambiguous such that "reasonable minds could differ with respect to its meaning, judicial construction is appropriate to determine its meaning." *Peterson v Magna Corp*, 484 Mich 300, 328 (2009), quoting *In re MCI Telecom Complaint*, 460 Mich 396, 411-412 (1999).

Third, pursuant to 1963 Const, art 6, § 28, the standard of review for a judicial or quasi-judicial administrative agency action is whether it is "'authorized by law'" and its factual findings are "'supported by competent, material and substantial evidence on the whole record.'" *Viculin v Dep't of Civil Serv*, 386 Mich 375, 384 (1971), quoting Const 1963, art 6, § 28; see also *Midland Cogeneration Venture Ltd Partnership v Naftaly*, 489 Mich 83, 97 (2011) (holding that "the Michigan Constitution guarantees judicial review . . . and this guarantee may not be jettisoned by statute").

Finally, this Court reviews de novo the trial court's decision on a motion for summary disposition. *Elba Twp, supra.* A party is entitled to summary disposition under MCR 2.116(C)(10) when "there is no genuine issue as to any material fact, and the moving party is entitled to judgment . . . as a matter of law."

ARGUMENT

I. APPLYING ESTATE RECOVERY AGAINST THE ESTATES VIOLATES PROCEDURAL DUE PROCESS UNDER THE FOURTEENTH AMENDMENT TO THE U.S. CONSTITUTION AND ARTICLE 1, § 17 OF THE 1963 MICHIGAN CONSTITUTION BECAUSE THE DHHS DID NOT PROVIDE TIMELY AND REASONABLY SUFFICIENT WRITTEN NOTICE OF THE PROVISIONS OF THE MEDICAID ESTATE RECOVERY PROGRAM AND WHAT ACTIONS MAY BE TAKEN AGAINST THE ESTATES AT THE TIME THE INDIVIDUAL MEDICAID BENEFICIARIES APPLIED FOR ENROLLMENT IN THE MEDICAID PROGRAM FOR LONG-TERM CARE SERVICES.

The Estates incorporate by reference the arguments presented in Issue II of the Appellant's brief of the Estate of Olive Rasmer in No. 1553356 showing that the Due Process Clauses under the state and federal constitutions require timely and reasonably sufficient written notice of the provisions of the estate recovery program and what actions may be taken against an individual's estate at the time the individual applies for enrollment in the Medicaid program for long-term care services. Consequently, because proper notice was not provided in these cases to the Medicaid beneficiaries or their legal representatives at the time of the application for enrollment in the Medicaid program, the DHHS cannot apply the estate recovery program retroactively against their Estates in these consolidated cases.

A. The Due Process Standards Stated in *Mullane* and its Progeny Are Controlling: The DHHS Did Not Provide Written Notice "Reasonably Calculated" Under All the Circumstances of the Provisions of the Estate Recovery Program and What Actions That May Be Taken Against An Individual's Estate.

Even though MCL 400.112g provided in 2007 that "the department of community health shall establish and operate the Michigan medicaid estate recovery program to comply with the requirements contained in [42 USC § 1396p]," this statutory notice was constitutionally insufficient in providing reasonably sufficient written notice of the provisions of the estate recovery program and what actions that the DHHS may take against an individual's estate under the Fourteenth Amendment to the U.S. Constitution and Article 1, § 17 of the 1963 Michigan Constitution. Contrary to the DHHS's claim, the U.S. Supreme Court's jurisprudence does not establish in these particular cases that that "the notice found in a statute suffices to meet the requirements of due process." (Appellant's Br, p 20). Specifically, ever since *Mullane v Central Hanover Bank & Trust Co*, 339 US 306 (1950), the U.S. Supreme Court has repeatedly affirmed that statutory notice provisions may not be sufficient for due process purposes when there are additional reasonable and affordable measures that will increase the sufficiency of notice. In *Mullane*, the Court made it clear that the party responsible for serving notice must act "as one desirous of actually informing" the individual recipients of their opportunity to protect their property rights. *Id.* at 315.[3]

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[3] Curiously, the DHHS never mentions *Mullane*, even though it relies upon cases *Grayden v Rhodes*, 345 F3d 1225 (CA 11, 2003) and *Texaco, Inc v Short*, 454 US 516 (1982), which extensively discuss *Mullane*. In particular, while *Grayden* recognized that '[f]or one hundred years, the Supreme Court has declared that a publicly available statute may be sufficient to provide such notice because individuals are presumptively charged with knowledge of such a statute," the Eleventh Circuit rejected that approach in favor of the *Mullane* standard in determining whether the provision in the Orlando city ordinance "was reasonably calculated, under all of the circumstances of this case, to provide the tenants with notice of their right to seek review. . ." 345 F3d at 1239, 1243.

The most recent pronouncement from the Court addressing the requirements of notice under the Due Process Clause was delivered in *Jones v Flowers*, 547 US 220 (2006) in which the question was "whether, when notice of a tax sale is mailed to the owner and returned undelivered, the government must take additional reasonable steps to provide notice before taking the owner's property." *Id.* at p 223. Reversing the judgment of the Arkansas Supreme Court, the Court in *Jones* held that "when mailed notice of a tax sale is returned unclaimed, the State must take additional reasonable steps to attempt to provide notice to the property owner before selling his property, if it is practicable to do so." *Id.* at 225. In *Jones*, the Court noted that pursuant to *Dusenbery v United States*, 534 US 161, 170 (2002), "[d]ue process does not require a property owner receive actual notice before the government may take his property;" rather, under *Mullane, supra* at 339, "we have stated that due process requires the government to provide 'notice reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections.'" In pertinent part, the Court stated:

> In *Mullane*, we stated that "when notice is a person's due . . . [t]he means employed must be such as one desirous of actually informing the absentee might reasonably adopt to accomplish it," 339 US, at 315, and that assessing the adequacy of a particular form of notice requires balancing the "interest of the State" against "the individual interest sought to be protected by the Fourteenth Amendment," *id.*, at 314. Our leading cases on notice have evaluated the adequacy of notice given to beneficiaries of a common trust fund, *Mullane, supra*; a mortgagee, *Mennonite* [*Bd of Missions v Adams*], 462 US 791 [(1983)]; owners of seized cash and automobiles, *Dusenbery*, 534 US 161; *Robinson v Hanrahan*, 409 US 38 (1972) (per curiam); creditors of an estate, *Tulsa Professional* [*Collection Services v Pope*], 485 US 478 [(1988)]; and tenants living in public housing, *Greene v Lindsey*, 456 US 444 (1982). In this case, we evaluate the adequacy of notice prior to the State extinguishing a property owner's interest in a home. [547 US at 229].

As pointed out in *Jones*, the notice principles stated in *Mullane* have been reaffirmed in a line of cases for over fifty years. For example, in *Mennonite Bd of Missions v Adams*, 462 US 791 (1983), the Court held that an Indiana statute requiring the county auditor to post notice in

the county courthouse of the sale of real property for the nonpayment of property taxes and to publish notice once each week for three consecutive weeks did not meet the requirements of the Due Process Clause of the Fourteenth Amendment. Specifically, in *Mennonite*, the Court held that notice by publication was not reasonably calculated to inform interested parties, including mortgagees, who could have been notified by more effective means such as personal service or mailed notice. *Id.* at 795-797. Because mortgagees have legally protected property interests, they are entitled to notice reasonably calculated to apprise them of a pending tax sale. In pertinent part, the Court stated:

> More importantly, a party's ability to take steps to safeguard its interests does not relieve the State of its constitutional obligation. It is true that particularly extensive efforts to provide notice may be required when the State is aware of a party's inexperience or incompetence. . . But it does not follow that the State may forego even the relatively modest administrative burden of providing notice by mail to parties who are particularly resourceful . . . Notice by mail or other means as certain to ensure actual notice is a minimum constitutional precondition to a proceeding which will adversely affect the liberty or property interests of *any* party, whether unlettered or well versed in commercial practice, if its name and address are reasonably ascertainable. . . . [*Id.* at 799-800 (Emphasis in original)].

Similarly, in *Tulsa Professional Collection Services v Pope*, 485 US 478 (1988), the Court, relying on *Mullane* and *Mennonite*, held that the state notice statute was insufficient and that the Due Process Clause of the Fourteenth Amendment required notice by mail or other such means as is certain to ensure actual notice. *Tulsa Professional* involved a nonclaim statutory provision of Oklahoma's probate laws requiring contract claims to be presented to the executor or executrix of an estate within two months of the publication of notice of the commencement of probate proceedings. In *Tulsa Professional*, the claim was not filed within the two-month period following the publication of notice. There, the Court held that there was "significant state action" because the operation of the statute could have adversely affected the appellant's property interest, and thus was not a self-executing statute of limitations as in *Texaco, Inc v*

Short, 454 US 516 (1982). *Tulsa Professional, supra*, 485 US at 485-487. Thus, the Court held that if Tulsa Professional Collection Services' identity as a creditor was known or "reasonably ascertainable," then the Due Process Clause required "notice by mail or other means as certain to ensure actual notice." *Id.* at 491, quoting *Mennonite, supra*, 462 US at 800.

Applying the controlling due process principles stated in *Mullane* and its progeny to the present cases, it is clear that the bare statutory notice stated in MCL 4112g is constitutionally insufficient by itself in providing written notice that was "reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections." *Mullane, supra*, 339 US at 314. Rather, as explained in Issues II of the Appellant's brief for the Estate of Olive Rasmer in No. 153356, what is required by the Due Process Clause is that the DHHS provide written notice of the actual provisions of the estate recovery program and what actions may be taken against the Medicaid beneficiary's estate after his or her death at the time the individual applies for enrollment in the Medicaid program for long-term care services. First of all, interpreting MCL 400.112g(3)(e) and MCL 400.112g(7) harmoniously, the DHHS was statutorily required to provide the individual, at the time of his or her application for enrollment in Medicaid, with written materials describing the provisions of the Michigan Medicaid estate recovery program, including, but not limited to, a statement that some or all of their estate may be recovery. Second, §3810G(1) of the CMS' *State Medicaid Manual* requires the DHHS to provide written notice describing the provisions of the estate recovery program and what actions may be taken against an individual's estate at the time the individual applies for enrollment in the Medicaid program for long-term care services. Thus, the mere statutory announcement in 2007 that Medicaid beneficiaries were subject to estate recovery, but without specifying the actual written provisions that complied with the

requirements contained in 42 USC §1396p and the CMS' *State Medicaid Manual*, was constitutionally insufficient in providing notice that was "reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections." *Mullane, supra*, 339 US at 314.

As the U.S. Supreme Court observed in *Mullane*, adequate notice under the Due Process Clause has two components: (1) it must inform the affected parties of the action about to be taken against them and (2) the procedures available for challenging that action. *Mullane, supra*, 339 US at 314; see also *Memphis Light, Gas & Water Division v Craft*, 436 US 1, 13 (1978). At bottom, the inquiry is about what process is due in light of "the practicalities and peculiarities of the case." *Mullane, supra*, 339 US at 314. In this regard, the key focus is the reasonableness of the means chosen by the State, and whether a particular method of notice is reasonable depends on the outcome of the balance between the "interest of the State" and the "individual interest sought to be protected by the Fourteenth Amendment." *Id.* at 314-315. Here, the method of notice that was reasonable was to provide the written materials about the estate recovery programs to individuals and inform them about what actions may be taken against their estates at the time they applied for enrollment in the Medicaid program for long-term care services.

Further, as explained in *Jones*, such a method of statutory notice employed by the DHHS in these cases was not reasonably calculated to inform individuals of the nature and scope of the estate recovery program affecting his or her property interests so as to satisfy the requirements of the Due Process Clause. More was obviously required, as the statute plainly requires. Specifically, interpreting MCL 400.112g(3)(e) and MCL 400.112g(7) harmoniously, the DHHS had to provide written materials to the individual at the time of the application for enrollment

describing the provisions of the Michigan Medicaid estate recovery program, including, but not limited to, a statement that some or all of their estate may be recovery.

In addition, the Court recognized in *Mennonite* that "a party's ability to take steps to safeguard its interests does not relieve the State of its constitutional obligation" and that "particularly extensive efforts to provide notice may be required when the State is aware of a party's inexperience or incompetence." *Mennonite, supra*, 462 US at 799. This is especially true of the older individuals applying for enrollment in the Medicaid program for long-term care assistance, who definitely require more extensive efforts due to frailty or infirmity, such as Irene Gorney, William French, Wilma Ketchum, and Olive Rasmer, each of whom was in a debilitated state of health. As the U.S. Supreme Court made clear, what is minimally required by the Due Process Clause are "means as certain to ensure actual notice" about a "proceeding which will adversely affect the liberty or property interests of *any* party, whether unlettered or well versed in commercial practice, if [one's] name and address are reasonably ascertainable." *Id.* at 800 (Emphasis in original). Unquestionably, the means of ensuring proper notice in these cases called for providing written information in clear and understandable language describing the provisions of the estate recovery program and the actions that may be taken against an individual's estate at the time of application for enrollment in Medicaid.[4]

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[4] See Jon M. Zieger, *The State Giveth and the State Taketh Away: In Pursuit of a Practical Approach to Medicaid Estate Recovery*, 5 Elder L J 359, 392 (1997), who makes the following observations:

> Placing greater emphasis on full disclosure of Medicaid estate recovery and its possible effect on the recipient's estate would allow recipients and their representatives to make an informed decision to accept or reject Medicaid assistance. The example of one Maine homeowner who is a Medicaid recipient is instructive. She reported being completely surprised that the Medicaid payments accepted by her would create a debt of her estate. In most states, notice is given to recipients at the time they apply for benefits. Typically, a recipient is notified by a statement acknowledging the possibility and import

Finally, these principles were reaffirmed in *Tulsa Professional*, which held that state action that adversely affects property interests must be accompanied by notice that is reasonable under the particular circumstances, balancing the State's interests and the due process interests of individuals. When an affected individual's name and address are reasonably ascertainable, then the Due Process Clause requires that notice be given by mail or such other means as is certain to ensure actual notice. In this case, what is required by the Due Process Clause to ensure proper notice is that DHHS provide the individual Medicaid beneficiaries with written notice of the actual provisions of the estate recovery program and what actions may be taken against their estates at the time they apply for enrollment in Medicaid.

B. Statutory Notice Was Constitutionally Insufficient in Providing Reasonably Sufficient Written Notice of the Provisions of the Estate Recovery Program and What Actions That May Be Taken Against the Individual's Estate.

Although the DHHS maintains that "[m]ultiple decisions of the U.S. Supreme Court establish that notice found in a statute suffices to meet the requirements of due process" (DHHS Br, p 20), a close analysis reveals that all these cases are clearly distinguishable. While it is true that a publically available statute may sometimes be sufficient to provide statutory notice that satisfies the requirements of due process, this occurs only in a limited class of cases.

> of estate recovery, which the recipient must read and sign before receiving benefits, or through an explanation by the case worker during the public aid intake procedure. . . . However, because of age or infirmity, the ability of many Medicaid recipients to understand the consequences of estate recovery or alternatives to Medicaid may be limited. Thus, states should provide counseling to recipients or their representatives, including a description of the estate recovery program and its probable impact in the recipient's case based upon a review of the recipient's individual circumstances. Additionally, states should take steps to publicize the existence and operation of estate recovery programs so that elders are made aware of the potential consequences of accepting Medicaid well before they require it. Most importantly, a clear statement of the alternatives to accepting Medicaid, if any, should be provided to the recipient and his or her representatives . . . . (Footnotes omitted).

For example, the DHHS relies upon *Reetz v Michigan*, 188 US 505 (1903) in which this Court applied the principle of statutory notice to charge the plaintiff with notice of the right to an opportunity to be heard regarding the denial of his application to practice medicine. In affirming this Court's rejection of the due process challenge, the U.S. Supreme Court succinctly explained that the state statute provided for semiannual meetings of the board of registration at certain times at which the plaintiff could have presented his application. Thus, the Court held that "when a statute fixes the time and place of meeting of any board or tribunal, no special notice to parties interested is required. The statute is itself sufficient notice." *Id.* at 509. The principle declared in *Reetz*, however, has no application to the facts and circumstances of the present cases, which involve a demand for more than mere statutory notice of the existence of the estate recovery program, but require specific written information about the actual provisions of the estate recovery program provided to the individual at the time of the application for enrollment in Medicaid and what actions may be taken against their estates after death.

Similarly, the DHHS' reliance upon *Texaco, Inc v Short*, 454 US 516 (1982) is also clearly distinguishable. *Short* involved the appellant's failure to use the mineral interests on a tract of land for twenty years as required by an Indiana state statute. As *Short* recognized:

> The reasoning in *Mullane* is applicable to a judicial proceeding brought to determine whether a lapse of a mineral estate did or did not occur, but not to the ***self-executing feature*** of the Mineral Lapse Act. The due process standards of *Mullane* apply to an "adjudication" that is "to be accorded finality." The Court in *Mullane* itself distinguished the situation in which a State enacted a general rule of law governing the abandonment of property. It has been established that "laws [must] give the person of ordinary intelligence a reasonable opportunity to know what is prohibited, so that he may act accordingly. *Grayned v City of Rockford,* 408 US 104, 108, but it has never been suggested that each citizen must in some way be given specific notice of the impact of a new statute on his property before that law may affect his property rights.
>
> As emphasized above, appellants do not challenge the sufficiency of the notice that must be given prior to an adjudication purporting to determine that a mineral interest has not been used for 20 years. Appellants simply claim that the absence of specific notice

> prior to the lapse of a mineral right renders ineffective the self-executing feature of the Indiana statute. That claim has no greater force than a claim that a self-executing statute is unconstitutional. The Due Process Clause does not require a defendant to notify a potential plaintiff that a statute of limitations is about to run, although it certainly would preclude him from obtaining a declaratory judgment that his adversary's claim is barred without giving notice of that proceeding. [*Id.* at 535-536](Emphasis added.)

As noted in *Tulsa Professional*, the Court in *Short* held that "it is the 'self-executing feature' of a statute of limitations that makes *Mullane* and *Mennonite* inapposite." *Tulsa Professional, supra*, 485 US at 486, citing *Short, supra*, 454 US at 533, 636. As explained in *Tulsa Professional*:

> The State's interest in a self-executing statute of limitations is in providing repose for potential defendants and in avoiding stale claims. The State has no role to play beyond enactment of the limitations period. While this enactment obviously is state action, the State's involvement in running of the time period generally falls short of constituting the type of state action required to implicate the protections of the Due Process Clause. [485 US at 486-487].

The present cases clearly differ from *Short* and the other cases in which the Court has held that the statutory notice is sufficient since they do not involve "the self-executing feature of a statute of limitations uniformly affecting all citizens that establishes the circumstances in which a property interest will lapse through the inaction of its owner." *Short, supra*, 454 US at 537. Far from being a self-executing statute, MCL 400.112g is an "enabling statute" that announced to the citizenry that "the department of community health shall establish and operate the Michigan Medicaid estate recovery program to comply with the requirements contained in [42 USC §1396p]." [5]By its own terms as an enabling statute, MCL 400.112g made it clear that what was generally defined in the estate recovery program still had to be implemented pursuant to a state plan that required federal approval. 42 USC §1396p; MCL 400.112g(5). Further, it was not until May 23, 2011 that Michigan's initial state plan for estate recovery was finally approved

[5] See *Black's Law Dictionary* 1448 (8th ed. 2004) (defining "enabling statute" as "[a] law that permits what was previously prohibited or that creates new powers"); *Black's Law Dictionary* 526 (6th ed. 1990) (defining the term "enabling statute" as "any statute enabling . . . agencies to do what before they could not").

by the Centers for Medicare and Medicaid Services ("CMS"). Consequently, unlike *Short*, there was significant state action requiring the DHHS' implementation of the Michigan Medicaid estate recovery program that implicated the protections of the Due Process Clause. See *Tulsa Professional, supra*, 485 US at 487.

Accordingly, given that the due process inquiry, reduced to its core value under the principles set forth in *Mullane* and its progeny, is one of "fundamental fairness," mere statutory notice about the existence of the Medicaid estate recovery clearly fails to satisfy the Due Process Clause since the DHHS was required to provide the individual Medicaid beneficiaries – Irene Gorney, William French, Wilma Ketchum and Olive Rasmer – with written notice of the actual written provisions of the estate recovery program, as approved by the CMS, and the actions that could be taken against their Estates at the time they applied for enrollment in Medicaid.

II. THE RETROACTIVE APPLICATION OF THE ESTATE RECOVERY PROGRAM AGAINST THE ESTATES VIOLATES SUBSTANTIVE DUE PROCESS UNDER THE FIFTH AND FOURTEENTH AMENDMENTS TO THE U.S. CONSTITUTION AND ARTICLE 1, § 17 OF THE 1963 MICHIGAN CONSTITUTION.

The Estates incorporate by reference the analysis set forth in Issue III of the Appellant's Brief for the Estate of Olive Rasmer in No. 153356. As explained therein, the Due Process Clauses under the Fifth and Fourteenth Amendment to the U.S. Constitution and Article 1, §17 of the 1963 Michigan Constitution provide that the state shall not deprive a person of life, liberty, or property without due process of law. *Elba Twp*, supra, 493 at 288. Here, the DHHS violated the Due Process Clauses under the state and federal constitutions by failing to provide timely and reasonably sufficient notice of the written provisions of the estate recovery program and what actions may be taken against the Estates at the time the Medicaid beneficiaries applied for enrollment in the Medicaid program for long-term care services. Because the DHHS failed to

provide proper notice under the Due Process Clauses, the estate recovery program cannot be applied retroactively against the Estates in these cases.

A. The Property Interests Protected by Due Process Are the Real and Personal Property of the Individual Medicaid Beneficiaries.

The crux of this matter is DHHS' contention made throughout this litigation that the property interests at stake are created by statute. The essential factual predicate for the DHHS' argument in support of retroactive application of the estate recovery program, however, is simply false, as the DHHS blatantly ignores the obvious fact that the property interests that are the object of its estate recovery collection efforts are the real and personal property in the probate estates of the Medicaid beneficiaries themselves. Simply put, a basic principal of the law of wills encompasses the notion that an individual possesses the right to dispose of his or her property upon death according to that individual's desires. *Abraham v Doster,* 310 Mich 433, 444 (1945). This right is a property right and deprivation of such a right cannot occur without due process of the law. Accordingly, by not providing the individual Medicaid beneficiaries with timely and proper written notice about the provisions of the estate recovery program and what actions may be taken against their estates at the time they applied for enrollment in the Medicaid program for long-term care services, the Due Process Clause precludes the DHHS from retroactively seeking estate recovery against the personal and real property contained in probate estates that legally and rightfully belong to the Medicaid beneficiaries themselves.

In this regard, the DHHS' reliance upon *Atkins v Parker*, 472 US 115 (1985) is completely off the mark. Unlike the present cases, *Atkins* involved whether food stamp recipients were provided with proper notice under the Due Process Clause of changes in the level of food stamp benefits. In *Atkins*, the Court noted:

> Food-stamp benefits, like welfare benefits at issue in *Goldberg v Kelly*, 397 US 254 (1970), "are a matter of statutory entitlement for persons qualified to receive them." *Id.* at 262 (footnote omitted). Such entitlements are appropriately treated as a form of "property" protected by the Due Process Clause; accordingly, the procedures that are employed in determining whether an individual may continue to participate in the statutory program must comply with the commands of the Constitution. *Id.* at 262-263. (Footnote omitted).
>
> This case, however, does not concern the procedural fairness of individual eligibility determinations. Rather, it involves a legislatively mandated substantive change in the scope of the entire program. Such a change must, of course, comply with the substantive limitations on the power of Congress, but there is no suggestion in this case that the amendment at issue violated any such constraint. Thus, it must be assumed that Congress has plenary power to define the scope and the duration of the entitlement to food-stamp benefits, and to increase, to decrease, or to terminate those benefits based on its appraisal of the relative importance of the recipients' needs and the resources available to fund the program. The procedural component of the Due Process Clause does not "impose a constitutional limitation on the power of Congress to make substantive changes in the law of entitlement to public benefits." *Richardson v Belcher*, 40 US 78, 81 (1971).
>
> The congressional decision to lower the earned-income deduction from 20 percent to 18 percent gave many food-stamp households a less valuable entitlement in 1982 than they had received in 1981. But the 1981 entitlement did not include any right to have the program continue indefinitely at the same level, or to phrase it another way, did not include any right to the maintenance of the same level of property entitlement. Before the statutory change became effective, the existing property entitlement did not qualify the legislature's power to substitute a different, less valuable entitlement at a later date. As we have frequently noted: "[A] welfare recipient is not deprived of due process when the legislature adjusts benefit levels . . . [The] legislative determination provides all the process that is due. [472 US at 128-130].

By contrast, what is in contention in these cases are not statutory entitlements to Medicaid long-term care services, but rather whether the Due Process Clauses under the federal and state constitutions prevent the DHHS from seeking estate recovery against the estates of Medicaid beneficiaries for the costs of Medicaid long-term care services when the DHHS did not provide timely and reasonably sufficient written notice of the provisions of the estate recovery program and what actions may be taken against the estates of Medicaid beneficiaries at the time they applied for enrollment in Medicaid. Thus, unlike the reduction of the statutory entitlement

to certain level of food-stamp benefits, the Medicaid estate recovery program operates against the real and personal property in the probate estates of Medicaid beneficiaries. In short, the subject matter of this litigation is not about having a constitutionally cognizable property interest to statutory entitlements; it is about the personal and real property rights of the individual Medicaid beneficiaries themselves.

B. Retroactive Application of the Estate Recovery Program Abrogates the Vested Property Interests of the Individual Medicaid Beneficiaries Without Due Process of Law.

As explained in Issue III of the Appellant's Brief for the Estate of Olive Rasmer in No. 153356, pursuant to substantive due process under the Fifth and Fourteenth Amendments to the U.S. Constitution and Article 1, § 17 of the 1963 Michigan Constitution, DHHS cannot apply the estate recovery program retroactively applied against an individual's estate if the individual who received the Medicaid long-term care services had not received notice of the estate recovery program in the form of written information clearly and specifically describing the provisions of the Michigan Medicaid estate recovery program and what actions may be taken against an individual's estate at the time of his or her enrollment in the program. As stated in *Landgraf v USI Film Prods*, 511 US 244, 280 (1994):

> When a case implicates a federal statute enacted after the events in suit, the court's first task is to determine whether Congress has expressly prescribed the statute's proper reach. If Congress has done so, of course, there is no need to resort to judicial default rules. When, however, the statute contains no such express command, the court must determine whether the new statute would have retroactive effect, i.e., whether it would impair rights a party possessed when he acted, increase a party's liability for past conduct, or impose new duties with respect to transactions already completed. If the statute would operate retroactively, our traditional presumption teaches that it does not govern absent clear congressional intent favoring such a result.

Pursuant to the principles stated in *Landgraf*, the application of the estate recovery program against the Estates would abrogate the vested rights of the individual Medicaid

beneficiaries to the real and personal property in their probate estates without due process of law, i.e. lack of timely and reasonably sufficient notice of the written provisions of the estate recovery program and what actions could be taken against an individual's estate at the time the individual applied for enrollment in Medicaid. Because "[e]lementary considerations of fairness dictate that individuals should have an opportunity to know what the law is and to conform their conduct accordingly," the DHHS is barred by substantive due process from retroactively applying the estate recovery program against the Estates in these consolidated cases. *Id.*

III. THE DHHS' ESTATE RECOVERY EFFORTS UNDER MCL 400.112g(4) ARE SUBJECT TO JUDICIAL REVIEW PURSUANT TO 1963 CONST ART 6, § 28 AND THE MICHIGAN ADMINISTRATIVE PROCEDURES ACT ("APA"), MCL 24.306(1), OR THE REVISED JUDICATURE ACT ("RJA"), MCL 600.631.

The Estates incorporate by reference the analysis set forth in Issue IV of the Appellant's Brief for the Estate of Olive Rasmer in No. 153356. Specifically, the DHHS' determinations of cost-effectiveness under MCL 400.112g(4) are subject to judicial review to determine whether they accord with 42 USC § 1396p(b)(3) and are "reasonable" as required by § 3810E of the CMS' *State Medicaid Manual*. See *West Virginia v Thompson*, 475 F3d 204 (CA4 2007) (affirming the Secretary's determination that West Virginia's definition of hardship waiver was overbroad). Contrary to the DHHS' characterization, judicial review of its cost-effectiveness determinations is not "assum[ing] policy making authority over agency determinations, absent a clear legislative directive." (DHHS Br., p 43). Even though MCL 400.112g(4) does not explicitly state whether cost-effectiveness decisions are subject to judicial review, it is nonetheless the case that such review is authorized pursuant to MCL 24.306(1) of the Administrative Procedures Act to determine whether a party's rights have been prejudiced when the DHHS misapplies procedural or substantive law, was arbitrary, capricious, or an abuse of

discretion, or was not supported by competent, material, and substantial evidence on the whole record. [6]

Further, there is no merit in the DHHS' claim that allowing judicial review means that "personal representatives would be encouraged to use administrative costs, such as escalating attorney fees, as a sword to preserve inheritances and prevent estate recovery." (DHHS Br, p 45, citing "MCL 700.3805 (administrative costs are paid *before* the Department's claim)."(Emphasis in original). As applied to the Estate of Wilma Ketchum, there is no factual basis whatsoever for the DHHS' wild assertion since the Estate made the agency aware from the beginning – in every letter, document, brief, motion, and argument – that the estate's inventory was only $32,000, which would be exhausted by the $14,000 statutory exempt property allowance, funeral expenses, and administrative expenses, leaving little or nothing for their estate recovery claim, as borne out by the Account of the Fiduciary. (236a) [7] In any event, it is important to recognize that under MCL 700.3703(1), personal representatives have fiduciary duties to act in the best interests of the ***estate*** – not in the best interests of the State of Michigan. Thus, contrary to the

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[6] By comparison, there is a well-settled "presumption of reviewability" of federal administrative actions, and that the burden of showing nonreviewability is clearly on the federal administrative agency that seeks to prevent judicial review of a challenged action. *Abbott Laboratories*, 387 US 136, 140 (1967) (stating that "only upon a showing of 'clear and convincing evidence' of a contrary legislative intent should the courts restrict access to judicial review"); *Dunlop v Bachowski*, 421 U.S. 560, 567 (1975) (observing that absent an express statutory prohibition, "the Secretary, therefore, bears the heavy burden of overcoming the strong presumption that Congress did not mean to prohibit all judicial review of his decision.").

[7] It is necessary to point out that even though DHHS claimed in its appellant's brief to the Court of Appeals that the Estate of Wilma Ketchum argued that "MCL 400.112(4) should bar the Department's estate-recovery claim because the estate's anticipated attorney fees of litigating recovery might consume the entire value of the estate" (DHHS COA Br, p 12), the DHHS clearly misstated the Estate's position since "attorney fees" were never mentioned in any of the Estate's submissions to the probate court. Rather, it was only because of the DHHS' insistence in pursuing estate recovery against an estate of such meager resources, including this appeal and another appeal in *Estate of Ketchum v DHHS*, COA No. 324741, issued March 1, 2016 (2016 Mich App LEXIS 411), which caused attorney fees to accumulate.

DHHS' suggestion, there is nothing legally objectionable or unethical about a personal representative defending an estate against the DHHS' estate recovery actions when fulfilling his or her fiduciary duties by acting in the best interest of the estate.

Nevertheless, the DHHS grudgingly concedes that judicial review of its decisions is not "completely foreclosed," but claims only that "[t]he Department's actions may be constitutionally challenged if, for example, it pursued recovery against decedents based on their race, gender, or ethnicity." (DHHS Br, p 45). Relying upon *Warda v City Council of City of Flushing*, 472 Mich 326 (2005), the DHHS asserts that judicial review is limited whenever a statute lacks "judicially comprehensible standards." Thus, according to the DHHS, "[o]pening MCL 400.112g(4) up to judicial review will subject estate recovery to the preferences of individual judges." (DHHS Br, p 46). However, to put it bluntly, there is simply no legal basis in constitutional, statutory or common law supporting a state administrative agency's arbitrary declaration restricting judicial review of its determinations. *Marbury v Madison,* 5 US (1 Cranch) 137, 177 (1803) ("It is, emphatically, the *province* and duty of the judicial department to say what the law is.") (Emphasis added).

The fact of the matter is that even the DHHS' definition of cost-effectiveness itself is subject to judicial review to determine whether it is accordance with MCL 400.112g(3)(g) requiring that "[i]mplementing the provisions of section 1396p(b)(3) of title XIX to ensure that the heirs of persons subject to the Michigan medicaid estate recovery program will not be unreasonably harmed by the provisions of this program" and "reasonable" as required by § 3810E of the CMS' *State Medicaid Manual*.[8] Contrary to the DHHS' claim (DHHS Br, p 48),

[8] According to the DHHS, "Recovery is considered cost-effective when the potential recovery amount of the estate exceeds the cost of filing the claim and any legal work dealing with the claim, or if the recovery amount is about a $1,000 threshold."

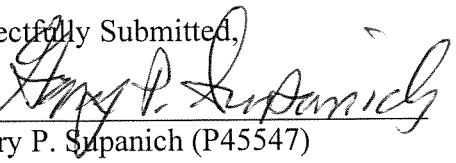
whether recovery is "in the best economic interests of the state" under MCL 400.112g(4) therefore must be subject to judicial review to ensure that heirs are not "unreasonably harmed" and that the recovery is "reasonable."

Accordingly, the Estate of Wilma Ketchum claims that the DHHS should not have pursued estate recovery in this matter since the costs of recovery do not exceed the amount of recovery available, nor was "the recovery in the best economic interests of the state," as provided in MCL 400.112g(4). In the *Estate of Wilma Ketchum*, the Inventory for the Estate filed at the Clinton County Probate Court lists assets with a total value of $32,350.66, which includes $30,000 for the homestead, and thus making a maximum of $2,350.66 subject to an estate recovery claim. However, as the Estate pointed out, pursuant to statute, funeral expenses, costs of administration, and the exempt property allowance would have higher priorities for payment. Given these facts in the *Estate of Wilma Ketchum*, it is apparent that whether the DHHS' decision to pursue estate recovery was "reasonable" and "unreasonably harmed" the heirs under these circumstances should be subject to judicial review under the standards stated in MCL 24.306(1), and not left to the "sole discretion" of the agency. Above all, the DHHS' position in pursuing estate recovery seemingly as an end in itself, untempered by the demands of justice and fundamental fairness, must be rejected out of hand.

CONCLUSION AND RELIEF REQUESTED

Based upon the foregoing, this Court should reverse Court of Appeals' decision in *In re Estate of Gorney* as to all the Estates and reinstate the probate courts' decisions granting the Estates' motions for summary disposition under MCR 2.116(C)(8) and (10), denying the DHHS' claims for estate recovery under MCL 400.112g-k.

Respectfully Submitted,

By: 

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